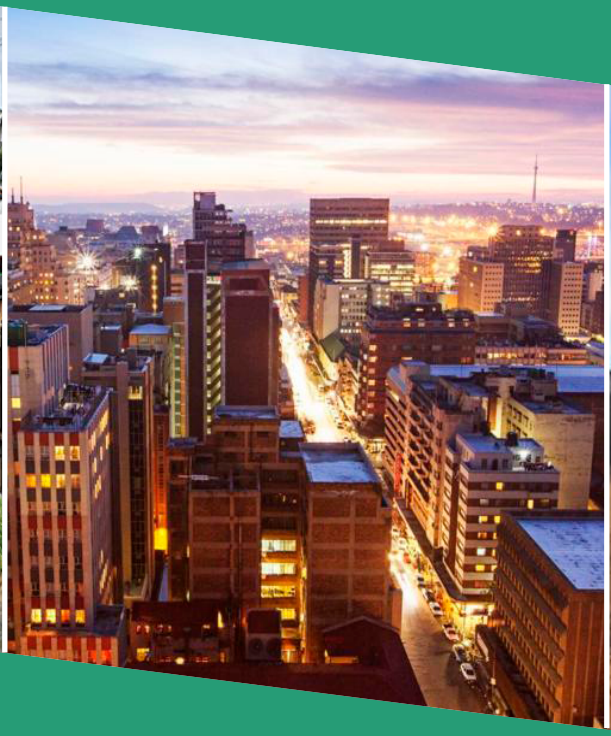

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ESR REVIEW

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ENSURING **RIGHTS** MAKE REAL **CHANGE**

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Editorial

Welcome to the fourth issue ***ESR Review*** in 2019 – the first in a series of special issues on access to justice.

2019 was known as the year of justice. For the first time, Sustainable Development Goal 16 (SDG 16) was reviewed, at the High-Level Political Forum in July 2019. Governments made a commitment to ensuring 'equal access to justice for all' by 2030, in addition to which 47 countries reported on their progress on SDG 16 in presentations on their voluntary national reviews (VNRs). SDG 16 seeks to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective accountable and inclusive institutions at all levels'.

The High-Level Political Forum is an annual event hosted by the United Nations (UN) Economic and Social Council (ECOSOC) at the UN in New York to review progress on the SDGs. This special issue is inspired by the inaugural evaluation of progress made by UN member states in implementing SDG 16. The issue aims to offer critical insights and recommendations about the links between the African Union's Agenda 2063 and Agenda 2030 regarding access to justice, the rule of law, human rights and democratic governance.

SDG 16 – in particular its target 16.3 (promote the rule of law at the national and international levels and ensure equal access to justice for all) – is relevant to migration. It calls on states to '[improve] access to justice, due process and equal legal treatment to address the needs and human rights of all migrant groups, including migrant workers, irregular migrants, victims of trafficking, asylum seekers and refugees, and as part of addressing the drivers of migration and displacement'.

In appreciation of the fact that non-citizens often struggle to access justice, this special issue of ***ESR Review*** focuses on access to justice for migrants, with two articles and a case review that deal with the matter in relation to economic and social cultural rights.

The first feature article, by Michelle Rufaro Maziwisa, analyses the integration of refugees and asylum-seekers into South Africa and their access to justice. The article pays particular attention to the interaction of migrants with the police and Department of Home Affairs, taking into account the intersectional inequalities and vulnerabilities of women.

The second feature, by Colman Ntungwerisho, foregrounds the challenges that refugees in Uganda face in their pursuit for justice and suggests various solutions. Ntungwerisho maintains that while Uganda has progressive laws and policies relating to refugees, resource constraints mean that most of the country's efforts are directed towards refugees' immediate needs for legal recognition, food and shelter, in the process side-lining other vital rights such as access to justice. In keeping with the SDGs' spirit of 'leaving nobody behind', Ntungwerisho argues that it is necessary as well as to address refugees' needs for access to justice.

All countries regulate the entry and exit of visitors from outside. In a case review, Obdiah Mawodza dissects a recent decision by the South African Constitutional Court decision, ***Nandutu and Others v. Minister of Home Affairs and Others*** (CCT114/18) [2019]. This case entailed a challenge to regulation 9(9)(a) of the Immigration Act 13 of 2002, which is administered by the Department of Home Affairs. The implication of the judgement is that spouses and children of South African citizens or permanent residents would not have to depart from South Africa in future when applying for a change in visitor's visa status.

In the events section, we highlight two side events on the theme of access to justice. In July 2019, the Dullah Omar Institute, in conjunction with the governments of South Africa and Indonesia, along with the African Centre of Excellence for Access (South Africa) to Justice and other partners, hosted a side event at the UN High-level Political Forum on Sustainable Development. In October 2019, the Dullah Omar Institute, again in conjunction with the African Centre of Excellence for Access to Justice (South Africa), hosted a side event at a meeting of the African Commission on Human and Peoples' Rights (ACHPR).

We thank our anonymous peer reviewer as well as our guest contributors, and hope that readers find this issue stimulating and useful.

Gladys Mirugi-Mukundi
Co-Editor

FEATURE

Access to Justice for African Migrants in South Africa

Michelle Rufaro Maziwisa

Africa has growing income inequalities, conflict, displacement, and economic crises, all of which tend to drive migration to South Africa despite the increasingly protectionist tendencies of the South African government. Migrants are perceived as a 'problem' and a 'threat' to jobs for South African nationals, perceptions that are exacerbated by careless comments made by persons in authority such as politicians and police officials. South Africa is committed in terms of the United Nations Sustainable Development Goals (UN SDGs 2015) to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels', yet its practice on the ground is a far cry from this commitment.

This article examines the way in which South African law and policy has increasingly securitised migration over the years and, in the process, reduced migrants' access to justice. The article takes particular interest in the interaction of migrants with the police, the Department of Home Affairs (DHA), and courts.

Securitisation

'Securitisation' entails the use of language and institutions that create the perception of refugees as a 'security' issue or 'crisis'. Sager notes that 'the language of crisis frequently plays into xenophobic discourses in which migrants and refugees are characterised as invaders, plagues, floods, waves or terrorists' (Sager forthcoming: 9). Framing migrants as a 'crisis' dehumanises them as 'flows' rather than people responding to an actual crisis (Sager forthcoming: 4).

Under apartheid

South Africa had a 'two-gate policy' in this era: 'The front gate welcomed people who corresponded to the criteria of attractiveness defined by the governing minority. The back gate served a double function, preventing unwanted migrants from entering and allowing cheap and relatively docile [labour] in for temporary periods' (Segatti 2008: 34).

South Africa's approach to immigration was grounded in its policies of racial separation. The 1910 Union of South Africa Act and 1950 Population Registration Act denationalised blacks, forced them to live in Bantustans (tribal homelands) and allowed them to enter the country only with ***dompas*** permits. These laws ran concurrently with the 1937 Aliens Control Act (1937 ACA) until the latter was replaced by the 1991 Aliens Control Act (ACA).

South Africa needed more whites to fill white-collar jobs and avoid being outnumbered by blacks, yet it also wanted to reduce the inflow of Jewish refugees and others to avoid a threat to European culture in the country (Segatti 2008: 35). The 1937 ACA thus limited Jewish refugees, Italian prisoners of war, Russians escaping pogroms, and French Huguenots to those 'likely to become readily assimilated' with whites in

the country. Consequently, between 1961 and 1991, the Republic welcomed many European refugees (and not African refugees), subsidising their travel expenses, accommodation and upkeep – it spent more than USD 4.8 million between 1972 and 1973, and about USD 2.9 million in 1991.

Although amendments to the ACA enabled non-European migrants to enter the Republic, they still had to assimilate; thus, black refugees from Mozambique, for example, had to assimilate with blacks living in the Bantustans. Furthermore, despite there being treaties to protect refugees, Mozambican refugees were deported ***en masse*** as 'illegal immigrants', and between the late 1990s and early 2000s very few managed to legalise their status (Segatti 2008: 38). In addition, section 55 of the ACA precluded judicial review of decisions on immigration.

Post-apartheid

Although the ACA was declared unconstitutional, more than a decade passed before it was replaced (Segatti 2008: 38). For example, section 47 of the ACA allowed restrictions on undocumented migrants, in violation of fundamental constitutional rights, and without recourse to judicial review. This resulted in human rights violations, mass deportations, and brutality from the police and military (Segatti 2008: 39).

By 1996, African and Asian immigrants had increased. Africans were mostly students at South African universities as well as workers who began filling white-collar jobs. The major policy documents of the post-apartheid government – the RDP, Gear 1996, and the Accelerated and Shared Growth Initiative (ASGISA) 2006 – were mostly silent on issues of migration.

South Africa soon acceded to the United Nations Convention Relating to the Status of Refugees (UNCRSR) (189, UNTS 150), Organisation of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Convention 10001 UNTS 45), African Charter on Human and Peoples' Rights (ACHPR), and UN Declaration of Human Rights (UDHR).

It committed itself, inter alia, to protect the rights to life, human dignity, freedom of movement, and protection of private property of persons within its borders, as evidenced by its commitment to interpret and apply the Refugee Act with due regard to international and

> **The main causes of Afrophobic attacks on black foreigners are socio-economic pressures**

regional instruments, including the UNCRSR, OAU Convention and UDHR, as set out in section 6 of the Refugee Act 130 of 1998.

Article 12 of the ACHPR requires states to grant the right to people to move freely in the country, while article 26 of the UNCRSR grants the same rights specifically to refugees. Article 16 of the UNCRSR requires states to treat refugees with the same access to courts as nationals. The ACHPR guarantees the right to life and integrity (article 4); liberty and security of the person (article 6); equal access to public service, such as police protection (article 13); and the right to protection of private property (article 14).

These rights are echoed in articles 3, 13, 21, 17 of the UNDHR, respectively. Furthermore, the Constitution restates these same rights in sections 10, 11, 12, 9 and 25, which guarantee the right to life, freedom and security, equality and the right to property.

In 1998, South Africa enacted the Refugee Act to comply with its obligations under international law. The Act is a combination of the provisions of the UNCRSR and the OAU Convention on Refugees, and as such contains important provisions protecting the rights of refugees and asylum-seekers.

However, as early as 1998 and only four years into democracy, Human Rights Watch (HWR) reported rising levels of xenophobia in South Africa and increasing perceptions of foreigners as criminals, drug dealers, and causes of unemployment (HRW 1998). A decade later, xenophobia erupted in attacks on foreign nationals in what was described as 'an orgy of violence' that was 'jumping like veld fire from place to place' (Everatt 2011: 8).

Section 13(b) of the 2002 Immigration Act was

amended to require a repatriation guarantee for departure. Similarly, section 10A of the Immigration Amendment Act 19 of 2004 requires foreign nationals to present a valid permit upon demand, thereby further restricting the mobility of foreign nationals in violation of article 26 of the UNCRSR. To make matters worse, informal pamphlets circulated in poor communities offered rewards to encourage people to 'help' the police identify foreign nationals, especially Mozambicans (HRW 1998).

Politicians have been known to use populist and securitising language in rallies as a means to secure votes in national and provincial elections. In 2008, more than 62 foreign nationals were killed and 150,000 displaced (Segatti 2011). In 2015, three weeks after Zulu King Zwelithini made inflammatory comments calling for foreigners to go back to their countries, there was a crisis in which, as at 17 April, six people had been killed and 5,000 displaced (UNHCR 2015).

These attacks were labelled as xenophobia, but in a truer sense they reflected Afrophobia, the fear of 'the black other from north of the Limpopo River' (Tshaka Unisa). The main causes of Afrophobic attacks on black foreigners are socio-economic pressures, as migrants are perceived as threats to access to housing and employment (Segatti 2008, 33), as well as threats to sexual relationships.

Thereafter, amendments were made to the Immigration Act. Section 5(3) of the Immigration Amendment Act 13 of 2011 prohibits entry into the Republic without a passport; such passport should have a visa, and the passport should be valid for 30 days after the intended date of departure. This provision introduced further stringent requirements for asylum-seekers, who may not be able to produce the required documentation because often they leave their homes in a rush.

Worse still is section 23(1) of the 2011 Act, which requires asylum-seekers to report to the nearest refugee reception office within five days, which is not always practical. For example, the Limpopo office attends to Zimbabwean and Congolese nationals only on Mondays and Tuesdays. This means an asylum-seeker from Zimbabwe who arrives on Tuesday afternoon can become unlawful by virtue of this time limit if for any reason he or she has difficulty in locating the refugee reception centre on the day of arrival.

The White Paper on International Migration for South Africa (DHA 2017) is contradictory to the extent that the same policy document introduces 'Asylum Seeker Processing Centres' where asylum-seekers are required to reside until their applications are processed. It is more stringent because it seeks to remove the automatic right of asylum-seekers to work and study. Despite the non-encampment policy, this heightened securitisation of asylum-seekers does not integrate them but forces them to be housed in centres whose conditions are yet to be determined. It also increases the state's financial burden.

At these centres, only 'low-risk asylum seekers may have the right to enter or leave the facilities under certain conditions'. It would be unfortunate if the determination of risk were based on determining certain countries as dangerous and accordingly treating migrants from them as high risks. This would normalise and legitimate differential treatment of asylum-seekers based on administrative discretion. It is also not yet clear whether applicants would have a right in effect to seek judicial review of their classification. Whatever the case, these developments clearly increase the burden on certain categories of asylum-seekers relative to what that burden is for others.

Effectiveness of access to justice

The United Nations Development Programme (UNDP) defines access to justice as 'the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards' (UNDP 2003). In the absence of access to justice, migrants are excluded from benefitting from specific legal provisions, particularly section 9 of the Constitution, which entrenches the right to equality and the prohibition on discrimination on the grounds of 'nationality', among other factors (Bloch 2010: 233). Women face intersecting vulnerabilities in the course of migration, such as physical and sexual abuse from traffickers, smugglers, border officials and the police force (Sager forthcoming: 9).

Police officials

In many cases, foreign nationals know their perpetrators

because they live with them in the same communities; consequently, they are fearful about reporting them to the police. Victims of xenophobic violence have also said that police respond to requests for assistance by insisting on cash payment (SAHRC 2008: 72). As a result, foreign nationals have come to expect little from the police who are supposed to protect them.

Secondly, the police have taken 'an observer role' (SAHRC 2008: 72), ignoring their duties and discriminating against foreign nationals. For example, a Zimbabwean truck-driver's stomach was slit open in front of the police while they were present 'monitoring the situation', but no arrests were made (Mavhinga 2019). There is no recovery of property damaged, looted or burned. With such impunity and a complicit police force, local communities can get away with xenophobic violence.

Thirdly, the HRW (1998) noted that both the police and DHA had been antagonistic towards lawful and undocumented migrants. For example, in 2013 a Mozambican national, Mido Macia, was accused of stealing a police gun and tied to a moving police van, as a result of which he sustained serious injuries (The Guardian 2013). If the police can behave in such an appalling manner, it becomes easy for civilians to emulate this lack of respect for the lives, health and integrity of foreign nationals, since they are secure in the knowledge of their impunity.

Department of Home Affairs

The 2017 White Paper on International Migration acknowledges that the existing system might not be identifying vulnerable applicants who need special protection and immediate assistance, such as women victims of war crimes (DHA 2017). Secondly, the DHA refugee centres often lack benches, clearly visible information desks, and forms translated into the languages of the region, leaving applicants vulnerable to crooks posing as 'agents' of the DHA. However, having to stand in a queue is not unlawful despite the health and psychological strain it might have on persons. Thirdly, children tend to miss school and tests because they have to be present at the DHA for all renewals and follow-ups, despite the fact that this disrupts children's integration into normal life.

Courts

Courts are one of the most important mechanisms for access to justice for migrants. They are supposed to give victims of violations such as xenophobic attacks the right to be heard. However, the court system is inherently expensive and adversarial, which makes it undesirable for many. Unlike refugees, who qualify for social protection and access to free legal aid from government institutions, asylum-seekers, undocumented and economic migrants are particularly vulnerable because they are excluded from these resources which advance access to justice.

Bail is also problematic, as some courts have ruled harshly and insisted on detention in lieu of a security deposit, which negatively affects poorer migrants. Undocumented migrants risk being deported if they approach the formal court system, which is an additional barrier to their access to justice.

However, the Constitutional Court is proving to be an invaluable tool for legal and policy reform. For example, in ***Lawyers for Human Rights v Minister of Home Affairs and Others***, the Court held that section 34(1)(b) and (d) of the Immigration Act 13 of 2002 were unconstitutional for failing to ensure that detained refugees were presented to the magistrate within 48 hours of detention. In another case, ***Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others***, the DHA had closed the refugee reception office in Cape Town on the basis that it encountered mostly economic migrants allegedly feigning asylum and that most asylum-seekers entered the country through its northern borders. The Court upheld Scalabrini's appeal and ordered the DHA to reopen the refugee reception office by 31 March 2018.

In ***Osman v Minister of Safety and Security and Others,*** the Western Cape Equality Court was faced with a complaint that certain police officers had been present during the looting of a foreign national's shop but watched without helping him despite their having the means to do so and being armed. The Court reasoned that although it was a terrible experience for the shop owner, there was no substantial evidence to prove his claim and held that the police had no positive obligation to protect the shops of the foreign nationals during a xenophobic

attack. The challenge is that the evidentiary burden is often so high, and the circumstances of the offence so difficult for obtaining evidence, that victims cannot ultimately get the recourse that is sought.

Conclusion

In conclusion, politicians and the institutions of the police and DHA should be held accountable for their statements in order to reduce securitisation of migration and the targeting of foreigners by local communities in response to political sentiments. The DHA must reform its refugee reception offices and procedures. The South African Human Rights Commission should strengthen its oversight role in this regard. More importantly, the government should allocate sufficient resources to enable migrants to access the justice system.

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FEATURE

Leaving Nobody Behind: The Access-to-Justice Challenges of Refugees in Uganda

Colman Ntungwerisho

Goal 16 of the SDGs is to 'promote peaceful and inclusive societies for sustainable development by providing access to justice for all and building effective accountable and inclusive institutions at all levels'. SDG 16.3 commits the international community to 'promot[ing] the rule of law at the national and international levels' and to ensuring 'equal access to justice for all' by 2030. In the light of the overarching aim the SDGs to 'leave nobody behind', the access-to-justice needs of refugees require attention too if Goal 16 is to be achieved.

The world faces a global migration crisis of a magnitude not witnessed since the Second World War. The increased movement of people across borders is driven by the search for better opportunities in the case of economic migrants, while for refugees it is driven by the flight from persecution or war in their home countries. While the issue of refugees has only recently become a global challenge, it has plagued Uganda, and sub-Saharan Africa in general, for a long time.

Ever since it hosted its first refugees from Poland during the Second World War, Uganda has been both a source and host for refugees (Pincwya 1998). It has hosted various generations of refugees, including those displaced by the first Sudanese civil war, the Rwandan genocide and rebel conflicts in the DRC spanning the last three decades. The latest round of refugees is a result of civil war in South Sudan and the renewal of rebel activities in the eastern DRC. The official figures of the United Nations High Commissioner for Refugees (UNHCR) indicate that at the end of 2018 Uganda was host to 1.2 million refugees, the highest number in its history – but a number that is set to rise even higher.

> **Uganda has received global acclaim for its progressive refugee laws and policies**

Uganda has received global acclaim for its progressive refugee laws and policies. In contrast to the developed world, which generally treats refugees and migrants with apprehension or indifference, Uganda's attitude towards hosting refugees is unusually warm. Many of the communities that host refugees, for instance those in northern Uganda, are resource-strapped because they are recovering from decades of armed conflict perpetrated by the rebel Lord's Resistance Army (LRA); nevertheless, they have responded with generosity to refugees by offering land on which they can be hosted and allowing them to set up shelters and gardens.

Under Ugandan law, specifically the Refugees Act of 2006 and Refugee Regulations of 2010, refugees

enjoy freedom of movement, access to the same social services as nationals, for example basic health care and primary education, and are allowed to start businesses or seek employment (sections 29 and 30 of the Refugees Act). Uganda's refugee response is also guided by the 1951 Refugee Convention and the Protocol of 1967, together with the principle of non-refoulement, which is the cornerstone of refugee protection.

The major case touching on the rights of refugees in Uganda is ***Center for Public Interest Law Ltd & Salima Namusobya v Attorney-General*** (Constitutional Petition No. 34 of 2010), where the Constitutional Court considered whether the prohibition of refugees from acquiring citizenship by registration under article 12(2)(c) of the 1995 Constitution of Uganda (read together with section 14(2) of the Uganda Citizenship and Immigration Control Act and section 6(1)(d) of the Refugee Act) was unconstitutional. The Court held that the provisions were constitutional since refugees could still apply to acquire citizenship by naturalisation under article 13 of the Constitution.

Access-to-justice challenges of refugees

When people flee their homes and seek refuge in foreign countries, they become highly vulnerable to poverty and marginalisation. This in turn limits their enjoyment of human rights, the right to access justice being chief among them. Furthermore, poor or vulnerable persons who are blocked from accessing justice are sometimes either forced to take justice into their own hands through illegal or violent means, or to accept unjust settlements (ISER 2019).

The United Nations defines access to justice as 'a process which enables people to claim and obtain justice remedies through formal or informal institutions of justice in conformity with human rights standards'. For refugees in Uganda, barriers to access to justice take various forms. Some are occasioned by the structure of the justice system in Uganda, while some are a direct result of the vulnerability of the refugees themselves, poverty being the most prominent factor in this condition.

> **Access to justice for refugees is hampered by the long distances between the courts of law and the refugee settlements**

In the first place, access to justice for refugees is hampered by the long distances between the courts of law and the refugee settlements. It should be noted that refugees in Uganda are hosted in settlements rather than camps. Usually, the only vacant land available to establish these settlements is in sparsely populated areas that are far away from the urban areas or important installations such as the courts of law, police posts and roads. As a result, refugees have to travel long distances, either on foot or by incurring great expense, whenever they or their relatives have matters pending before the courts of law. This situation is exacerbated by the slowness with which the judicial system resolves cases.

Besides the long distances, refugees are often met by a new justice system and laws unlike those in their home countries. Ignorance of the law and of their rights becomes an impediment to the enjoyment of the rights. Refugees also tend to prefer their traditional justice systems and transitional justice to formal courts of law (Jjuuko 2018). Despite the potential of the traditional justice systems of various refugee communities to deliver justice and address the justice needs of the refugees, they have been little recognised and harmonised with the national laws, given that section 14 of the Judicature Act (Chapter 13 of the Laws of Uganda) accords written laws precedence over any customary or unwritten laws.

The preference for informal justice systems is not peculiar to refugees alone – a study by the Hague Institute of Innovation of Law finds that courts and lawyers are marginal to the experience of day-to-day justice of the people in Uganda, with less than 5 per cent of dispute resolution taking place in a court of

law, and with lawyers involved in less than 1 per cent of the cases (HILL 2016). Considering that the influx of refugees has stretched the staff of the Uganda Police and those of the judicial system, notably the courts, innovative use of the traditional justice system would localise the ability to access justice quickly and more affordably (UNDP, LASPNET 2019).

Similarly, it is difficult for refugees to secure bail when they find themselves in conflict with the law. Under Ugandan law, specifically the Trial on Indictments Act and Magistrates Courts Act, one must prove to the court that one has a fixed place of abode before one can be granted bail. This is a difficult requirement for refugees to meet because of their being refugees: their settlements are not permanent in nature but intended to be temporary until they are repatriated.

Another difficulty arises from the lack of credible sureties to secure bail. Naturally, the closest relatives to detained refugees are also refugees, and it is just as difficult for them to prove a permanent place of abode. Moreover, the court always assumes that refugees pose a high flight risk and will escape to their home countries once released on bail. As a result, this affects their right to a fair hearing. Another reason for the difficulty refugees have in securing bail is that the long distances to the courts hamper their relatives in attending court to stand surety for them.

The high cost of legal representation is another barrier to accessing justice. As highlighted above, poverty is one of the factors that make refugees vulnerable. As they flee from persecution and insecurity in their home countries, they have no time to carry along their assets in the desperate attempt to remain alive. Refugees thus lack the financial capacity to pay for legal representation in demanding their rights. The long distances from settlements to the urban areas also make it hard to access legal aid service providers situated far away from the settlements – there are few providers which, like the Refugee Law Project of Makerere University or War Child Canada, specifically target refugees. More widely, Uganda's legal aid system is disorganised and operates in the absence of rules and regulations at the national level.

Due to the fact that the cause of displacement for many refugees in Uganda is civil war in their home countries, many also experience psychological barriers in accessing justice. According to the UNHCR (2016), 50 per cent of refugees worldwide (including both men and women) are victims of sexual and gender-based violence, a problem that is too often ignored. Others have suffered torture at the hands of government and rebel forces and therefore harbour fear or distrust of the police and army. As a result, criminal cases involving refugee victims are seldom reported and, when they are, take a long time to be resolved.

The challenges above point in various ways to a justice system that is generally unfriendly to refugees and not flexible enough to respond to their specific justice needs as a vulnerable group.

How to enable refugees' access to justice

To address the access-to-justice challenges of refugees in Uganda, a number of innovative solutions should be embraced and already existing initiatives, scaled up and introduced in all the refugee hosting areas. Efforts to address their needs in this regard should be directed not only at improving their access to advice and assistance but improving institutions such as the judiciary, police and prison services. A two-pronged approach would enable people to know their rights and how to demand them from a system that has the capacity to deliver on them (Manuel and Manuel 2018).

> **The mobile court system should be adopted in refugee hosting districts**

As a solution to the long distances that refugees often have to travel to access formal courts of law, the

> **Efforts should be directed towards providing transitional justice for victims of conflict-related sexual violence and torture**

mobile court system should be adopted in refugee hosting districts. The benefits of mobile courts have been felt in the districts of Adjumani and Lamwo in northern Uganda, where they have been piloted by the Refugee Law Project in conjunction with the judiciary. This system allows court sessions to be taken out of the court premises and held in the settlements hosting refugees. Mobile courts also enable scarce human resources to be used more efficiently, in the sense that the services are taken directly and proactively to the people rather than waiting for them to report cases to the police and the courts of law.

In addition, the traditional justice systems of the refugees should be embraced, streamlined and supported in order to be aligned with the national laws. One of the strong points of the traditional justice systems is their emphasis on reconciliation rather than retribution. Considering that most refugees in Uganda are victims of war, or became refugees while trying to flee from conflict, the element of reconciliation is all the more attractive in that it encourages peaceful co-existence, both in Uganda and in their home countries when they are eventually repatriated. Inspiration for these courts should be drawn from the success of the ***gacaca*** courts in Rwanda, which were established in the wake of the 1994 genocide to deliver justice and reconciliation in a deeply divided country.

Addressing the access-to-justice needs of refugees must also involve deliberate efforts towards their legal empowerment. Their disempowerment starts with language barriers, especially if they are unable to speak English, the official language of Uganda. To ensure that refugees have a say in decisions that affect them, they must be empowered to speak the national language of Uganda. Therefore, the government and civil society organisations should support the establishment of English classes for refugees, especially those who are adults and out of school. This would enable them to become stakeholders in the decision-making process for policies and laws that affect them, as well as to escape the silence often associated with being a refugee. Language skills also help ensure that refugees can defend themselves when they interact with the courts, be it as defendants or as plaintiffs demanding protection of their rights.

In addition, efforts should be directed towards providing transitional justice for victims of conflict-related sexual violence and torture. Due to the fact that many refugee communities are burdened by legacies of human rights violations, particular those relating to sexual and gender-based violence, it is important that initiatives to offer legal aid are complemented by psychosocial support (Dolan 2019). As such, the government and humanitarian actors should develop initiatives for providing counseling and psychosocial support to refugees to help them deal with the trauma associated with sexual violence, torture and loss.

Furthermore, more legal aid service providers targeting refugees should be established. Legal aid empowers refugees to demand their rights and ensures that they have access to legal representation when they are in conflict with the law. To cater adequately for the legal-aid needs of refugees, the Parliament of Uganda should fast-track the enactment of the Legal Aid Bill to regulate legal aid service providers. Similarly, the judiciary should train and hire more interpreters fluent in the languages spoken by refugees, for instance Arabic, Dinka and Nuer, for those from South Sudan, and French for those from the DRC. These measures, once implemented, would better protect refugees' right to a fair hearing.

The shift towards sustainable refugee management

It has become clear to humanitarian actors that a purely humanitarian approach to refugee situations is not sustainable. To overcome this challenge, development programmes are being integrated into humanitarian action. One of the reasons for this shift is that refugee situations are typically protracted affairs, with refugees remaining in a host country for up to 10 years. As a result, refugee programmes suffer when the long-term nature of conflicts is forgotten and donor fatigue sets in, leading to a significant reduction over time in the amount of resources available for refugee hosting programmes (Purkey 2013).

Thankfully, the New York Declaration and its Refugee and Host Population Empowerment (ReHoPE) programme have come up with a sustainable approach to refugee situations. The ReHoPE programme adds development interventions to the traditional humanitarian model and aims at making refugees self-reliant. It seeks to provide a comprehensive and sustainable solution to the current refugee crisis by catering for both the protection and socio-economic needs of refugees and the host communities. In Uganda, the ReHoPE programme has attracted assistance from the World Bank, traditionally a non-humanitarian organisation. This is a welcome move, as efforts directed at the economic empowerment of refugees will contribute to the sustainability of refugee hosting programmes in Uganda and reduce the vulnerability of refugees.

Conclusion

Apart from laying down international targets for justice, Goal 16 of the SDGs also serves to confirm that access to justice and development are closely interlinked. Therefore, in order to achieve sustainable development for refugees, access-to-justice programmes are one of the key elements that need to be catered for in the new model of refugee response.

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CASE REVIEW

The Implications of Nandutu and Others v Minister of Home Affairs and Others

Obdiah Mawodza

On 28 June 2019, South Africa's Constitutional Court handed down a judgment that nullified a decision of the Western Cape High Court and declared regulation 9(9)(a) of the Immigration Regulations constitutionally invalid as it discriminates against a foreign spouse and/or a child of a South African citizen or permanent resident. The decision of Nandutu and Others v Minister of Home Affairs and Others [2019] ZACC 24 (Nandutu case) is ground-breaking in protecting, respecting and fulfilling the rights of a foreign spouse and/or a child of a South African citizen or permanent resident to dignity and family life.

The migration crisis in South Africa

Migration remains one of South Africa's most contentious issues. The 2016 Community Survey by StatsSA reveals that almost 1.6 million immigrants are living in South Africa, a decline from 2.2 million in 2011. StatsSA also reveals that the decline was unexpected but could be due to foreign migrants not disclosing their true nationalities for safety reasons, given the resurgence of xenophobic attacks since 2008. Almost 75 per cent of foreigners in South Africa come from Africa, with the Southern African Development Community accounting for 68 per cent of those migrants. Many of the foreigners come from poor, war-torn or politically unstable countries and migrate to South Africa to seek refuge, better standards of living, employment opportunities, and the survival and development of their loved ones.

The search for greener pastures in South Africa has its own challenges, however. The local host communities have become hostile towards foreign nationals, as evidenced by the resurgence of xenophobic attacks since 2008. Why do South Africans attack foreign nationals? A 2017 cross-sectional survey by the Human Sciences Research Council (2018) revealed that locals believe foreigners (i) pose a threat to the labour market, (ii) use up resources such as housing, and (iii) have unfair business practices in their shops and small business.

These are economic reasons; however, political leaders are fuelling xenophobia by blaming migrants for the problems that confront South Africans. This anti-immigrant political rhetoric is now a political tool to maintain political power and relevance. For example, the 2015 xenophobic attacks came after Zulu King Goodwill Zwelithini called for 'those who come from outside to please go back to their countries', on the grounds that locals cannot compete with foreigners for the few economic opportunities available (Sibanda 2019).

Similarly, in November 2018, former Minister of Health Aaron Motsoaledi urged the government to re-look at its immigration policies because 'our hospitals are full, we can't control them … and when they get admitted in large numbers, they cause overcrowding, infection control starts failing' (Mbhele 2018). On the presidential campaign trail in April 2019, President Ramaphosa bemoaned that foreigners arrive in the country and set up businesses without valid licenses

and permits.

Kunene (2019) argues that these inflammatory comments breed anger among locals, which is then unleashed by attacking foreigners out of frustration at their lack of jobs, housing, health services, and employment. According to the Human Sciences Research Council (2018), there is no evidence to support the belief that foreigners are the cause of crime, that they unduly benefit from the government, or that they cause unemployment in the country. Contrary to this popular belief, a former Home Affairs minister, Malusi Gigaba, acknowledged foreigners for their positive contribution to South Africa's economy. The political scapegoating of foreigners shifts the blame onto foreigners for governmental failures to provide basic services, curb unemployment and close the inequality gap, as evidenced the Human Sciences Research Council's survey.

The reality is that, even after 25 years of democracy, the inequality gap persists and the dream of a rainbow nation remains a far-fetched prospect for many ordinary black South Africans. Corruption, nepotism, and lack of political will continue to marginalise them, in addition to the fact that white people own the means of production. As a result, the government has resorted to taking a regressive stance on asylum-seekers by adopting and implementing anti-immigrant laws and regulations such as regulation 9(9)(a).

Facts and judgment

The first applicant, Ms Nandutu, was a Ugandan citizen married to and resident with the second applicant, Mr Tomlinson, a South African permanent resident. Similarly, the third applicant, Mr Demerlis, a Greek citizen, was in a life partnership with the fourth applicant, Mr Ttofalli, a South African citizen.

Ms Nandutu entered South Africa on a temporary visitor's visa while pregnant with Mr Tomlinson's child. While in the Republic, Ms Nandutu applied for a spousal visa to remain in the country with her husband and son. The Department of Home Affairs rejected her spousal visa application, stating that section 10(6) of the Act does not allow temporary visa-holders, such as Ms Nandutu, to apply for a change in visa status from within South Africa – instead they have to return to their home countries to make such application.

Mr Demerlis' application for a spousal visa was also unsuccessful for similar reasons. The applicants could not invoke regulation 9(9)(a) of the immigration regulations, which exempts visitor's visa-holders from applying for a change in visa status from within South Africa. Regulation 9(9)(a) gives such exemptions to visitors who are either in need of emergency lifesaving medical treatment for longer than three months; or spouses or children who accompany business or work visa-holders and who wish to apply for a study or work visa. The regulation excludes spouses, life partners and children of a South African citizen or permanent resident from applying for a change in visa status while in the Republic.

Aggrieved by the outcome of their visa applications, the applicants approached the Western Cape High Court (High Court) to have regulation 9(9)(a) declared inconsistent with the Constitution. The applicants argued that the lack of an exception that catered for holders of visitor's visas who are spouses or children of South African citizens or permanent residents limited their constitutional right to dignity. The High Court dismissed the application and held that regulation 9(9)(a) did not infringe the right to dignity and was capable of passing constitutional muster. Unconvinced about the decision of the High Court, the applicants applied for leave to appeal directly to the Constitutional Court for relief.

The issues for determination were:

- Should leave to appeal directly to the Constitutional Court be allowed, given that it entails bypassing the Supreme Court of Appeal?
- Is regulation 9(9)(a) of the immigration regulations constitutionally invalid to the extent that it does not extend 'exceptional circumstances' to include those where an applicant is the spouse or child of a citizen or permanent resident?
- What is the appropriate remedy in this case?

The majority judgment was written by Mhlantla J and concurred with by Cameron J, Jafta J, Khampepe J, Madlanga J, Nicholls AJ and Theron J. In it, Mhlantla J granted applicants leave to appeal directly to the Constitutional Court. In delivering its judgment,

the Constitutional Court held regulation 9(9)(a) as constitutionally invalid because it unjustifiably limited the applicants' constitutional right to dignity and the right to consider the best interests of a child paramount in every matter concerning him or her. It held, furthermore, that an order suspending the constitutional invalidity of the regulation, coupled with an interim reading-in, was appropriate in order for the legislature to cure the invalidity.

Accordingly, the majority judgment (i) declared regulation 9(9)(a) constitutionally invalid, (ii) suspended the declaration of invalidity for 24 months, and (iii) ordered a reading-in on an interim basis of words that have the effect of adding to the exceptions under the regulation spouses or children of South African citizens or permanent residents. This ensures that spouses or children of South African citizens or permanent residents on a visitor's visa can apply for a change in visa status while in the Republic.

The minority judgment – written by Froneman J and concurred with by Mogoeng CJ and Ledwaba AJ – would not have granted applicants leave to appeal directly to the Constitutional Court. It held that section 21(3) of the Constitution only gives citizens the right to enter, to remain in and to reside anywhere in the country. Accordingly, visitors cannot legitimately expect to be granted section 21(3) rights in the absence of cogent information that they may be endangered or prejudiced by a policy requiring them to return home.

Implications of the judgment

This case is significant for a number of reasons. The first is that it is an example of litigation instituted in the public interest both of South African citizens and of their foreign spouses. Walia (2009) describes public interest litigation as 'expression for the sufferers of silence' as well as 'a blessing to the downtrodden, oppressed sections of society'. Accordingly, the applicants sought to engage the jurisdiction of the Constitutional Court because they firmly believed they were the sufferers of other foreign spouses' silence, and that they were oppressed by regulation 9(9)(a) as it infringed their right to dignity and the rights of children enshrined in sections 10 and 28 of the Constitution, respectively. The respondents argued that the matter did not warrant a direct leave to appeal, but rather adjudication by the Supreme Court of Appeal.

After considering all the facts, the Constitutional Court held that the matter before it raised an important constitutional issue the outcome of which impacts on other families in a similar position as the applicants. Section 167(3)(b) of the Constitution also empowers the Constitutional Court to grant a leave to appeal if the matter before it raises a contentious point of law of general public importance. Indeed, the matter before the Court was whether it is constitutionally permissible to compel all foreign spouses and children of South African citizens or permanent residents holding visitor's visas to leave South Africa to apply for a change of visa status. The Court appositely held that it was in the interests of the public to grant the appeal and adjudicate the matter. The decision bodes particularly well in furthering the interests of vulnerable groups, such as foreign spouses and children, and protecting their human rights.

Secondly, the ruling exposed the discriminatory scope of regulation 9(9)(a) against foreign spouses and children of South Africans. Before this ruling, regulation 9(9)(a) provided:

> The exceptional circumstances contemplated in section 10(6)(b) of the Act shall –
>
> (a) in respect of a holder of a visitor's visa, be that the applicant –
>
> (i) is in need of emergency lifesaving medical treatment for longer than three months;
>
> (ii) is an accompanying spouse or child of a holder of the business or work visa, who wishes to apply for a study or work visa.

The respondents had argued that the omission of a foreign spouse or child of a South African citizen or permanent resident served to prevent fraudulent marriages and undesirable persons from entering the country. Similarly, the High Court had also held that regulation 9(9)(a) prevents a marriage to a foreigner within South Africa 'from becoming a loophole for criminals to circumvent the immigration restrictions, health risk or a compromise to the welfare of the people of the Republic'.

Questions that arise from this short-sighted premise include why an accompanying spouse or child of a holder of the business or work visa is not subjected to the same requirements if it is really about circumventing fraudulent marriages and undesirable persons. Why does the regulation allow the spouses

of foreign holders business and work visas to change status from within South Africa, but require spouses of South African citizens to apply outside of South Africa?

Arguably, foreign spouses and children of South African spouses were treated less favourably than those of holders of business and work visa for economic reasons. It is submitted that the differential treatment existed because the holder of the business or work visa brought investment or contributed to economic growth, whereas spouses of South Africans residing in the Republic were associated with overstaying or bogus asylum-seekers who seek to acquire legal status through marriages of convenience or acquire identity documents fraudulently.

In support of this view, the Constitutional Court held that the respondents had failed to show how the requirement imposed upon spouses and children of citizens or permanent residents was proportionate in preventing fraudulent marriages. Of concern was the existence of this limitation despite respondents' acknowledging witnessing a decline of fraudulent marriages as well as having processes in place that detect fraudulent marriages when visa applicants are within the country. Therefore, the Constitutional Court rightly held the respondents had less restrictive means than regulation 9(9)(a) to prevent fraudulent marriages and/or protect the interests of South Africa. Rightly so, regulation 9(9)(a) was found constitutionally invalid to the extent that it did not extend the rights accorded by means of the exceptional circumstances contemplated in section 10(6)(b) of the Immigration Act to the foreign spouse or child of a South African citizen or permanent resident.

The third seminal impact of the Constitutional Court's decision to expand the scope of regulation 9(9)(a) to include ***'(iii) … the spouse or child of a South African citizen or permanent resident'***. The Constitutional Court took consideration of striking a balance on (i) the need to afford appropriate relief to successful litigants and (ii) the need to respect the separation of powers. The Constitutional Court rightly struck the balance by, first, granting applicants' interim reading-in relief, which now enables foreign spouses on a visitor's visa to apply for a change of status while in South Africa. Secondly, it gave the legislature two years to rectify regulation 9(9)(a). Had the Constitutional Court not intervened, these foreign spouses would have remained marginalised by the immigration rules, which would also violate the right of their South African spouses to family life and dignity.

Finally, the decision ensures that others who were or are in a similar position no longer have to incur unwarranted travel expenses in going back to their home countries to apply for a change of status. The double jeopardy of applying in the home country was that applicants would have been required to submit their passports as part of the application for a change of status. This has the negative effect of separating foreign spouses from their South African counterparts and/or children. Where their South African spouses cannot leave the country with their spouses, regulation 9(9)(a) still causes separation of family, whose reunion was dependent on the expediency of the other country in giving a decision on the application. In Zimbabwe, for example, visa applications can take up to eight months before a decision is finalised. Thus, this ruling is a blessing to the downtrodden – foreign spouses in this case – who would have had to endure long spells of separation from their South African spouses.

Obdiah Mawodza is a law educator at Boston City Campus & Business College, South Africa. He also contributes to research and advocacy related to the protection and promotion of children's rights.

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EVENT

A Side Event at the United Nations High Level Political Forum (HLPF) (New York, 16 July 2019)

Gladys Mirugi-Mukundi

The Dullah Omar Institute, in conjunction with the African Centre of Excellence for Access to Justice (South Africa), and together with other partners and the governments of South Africa and Indonesia, co-hosted a side event on 16 July 2019 at the United Nations (UN) High-level Political Forum on Sustainable Development (HLPF). The purpose of this event was to highlight the exemplary models of co-operation between government and civil society in countries in the Global South in implementing SDG 16.3 on access to justice.

This, the seventh session of the HLPF, took place under the auspices of the UN Economic and Social Council (ECOSOC) from 9–18 July 2019. The HLPF, which involves the participation of all UN member states, from both developed and developing countries, as well as relevant UN entities and stakeholders, is the central platform for follow-up and review of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals. A record number of member states presented voluntary national reviews (VNR) at the HLPF, which coincided with World Day for International Justice (July 17) and Nelson Mandela Day (July 18).

2019 was a special year for highlighting innovative justice work at the UN as it was the first time there was an in-depth, special thematic look at progress made towards SDG 16, including access to justice. Themed 'Empowering people and ensuring inclusiveness and equality', the HLPF reviewed progress towards the SDGs' Goal 4: Quality Education; Goal 8: Decent Work and Economic Growth; Goal 10: Reduced Inequalities; Goal 13: Climate Action; Goal 16: Peace, Justice and Strong Institutions; and Goal 17: Partnerships for the Goals.

> **2019 was a special year for highlighting innovative justice work at the UN**

The side event was well-attended by about 30 participants, with the governments of South Africa and Indonesia discussing their experiences on

access to justice. Speakers emphasised that the most innovative progress towards access to justice in recent years has been made by countries in the Global South. Long-term political commitment to achieving comprehensive access to justice is leading to significant impacts on many other SDGs, ranging from economic growth and gender equality to health and education.

Dr Diani Sadiawati (Deputy Minister of Development Planning, Indonesia) and Mr Febi Yonesta (Co-Chair, Indonesia Legal Aid Foundation) said that government and civil society are working together to establish a national network of local legal aid organisations. This network is helping to bring locally responsive justice advice and solutions to every part of Indonesia's diverse islands and communities. Government and civil society are taking forward Indonesia's ambitious Legal Aid Law, which recognises the role that paralegal advisors in civil society organisations play in achieving access to justice for all.

Dr Winnie Martins (Centre for Community Justice and Development, South Africa) spoke about the crucial role that a network of independent community advice offices (CAOs) plays in offering free legal and human rights information, advice and assistance to marginalised people. CAOs are staffed by community members who are not lawyers, and help in the effort to secure access to justice and advance substantive rights, including those to health, housing and decent work.

In his presentation, Mr Risenga Maluleke, Statistician-General and Head of Statistics South Africa (Stats SA), said that South Africa is working at the global, regional and national level to align its national policies with the SDGs and the broader development agendas. South Africa's first VNR, submitted in June May 2019, is testimony to the national commitment to the full and integrated implementation of the 2030 Agenda. He stated that the VNR recognises the role of community justice organisations in providing access to justice. At the time, StatsSA was busy analysing a household survey undertaken to gauge the legal needs of people in South Africa.

The speakers agreed that efforts in Indonesia and South Africa are emblematic of a broader shift:

> **Not many African civil society groups are conversant with the VNR process**

around the world, governments and civil society are deepening access-to-justice partnerships to deliver on developmental priorities. Participants also agreed that lack of access to justice is a problem in all countries, including some of the world's most prosperous nations. They proposed that by recognising and investing in the central role of civil society organisations in delivering access to justice, as well as by measuring people's everyday experiences of justice, UN member states could accelerate their progress towards achieving access to justice for all by 2030.

Participants said the HLPF presented an opportunity to interact with civil society groups from the south and north and to learn important lessons on how to navigate the space. Participants were concerned that African governments do not always include civil society groups in the preparation of their VNR reports. Although the HLPF requires governments to engage with civil society groups, many African governments tend to engage with them as a formality rather in a genuinely consultative process. By the same token, it was noted that not many African civil society groups are conversant with the VNR process; as a result, they do not engage with their governments during the reporting process or submit shadow reports.

There was general consensus among participants that having Africa-based civil society and community-based organisations at the HLPF and the UN Summit provides a unique opportunity at the international level for discussion and cross-learning in regard to access to justice.

EVENT

A Side Event at the African Commission on Human and Peoples' Rights (ACHPR) (Banjul the Gambia, 20 October 2019)

Gladys Mirugi-Mukundi

On 20 October 2019, the Dullah Omar Institute, in conjunction with the African Centre of Excellence for Access to Justice (South Africa) (ACE-AJ), hosted a side event at the African Commission Session in Banjul, with the focus on advancing access to justice in Africa.

The main goal of the workshop was to enhance the visibility of the ACE-AJ, which was established in 2017 as a continent-wide network of African civil society organisations working on the promotion of access to justice, universal human rights, rule of law and legal aid for marginalised and poor communities. ACE-AJ also seeks to promote the work of community justice institutions, to foster collaboration between the formal judicial system and community justice institutions, and draw the attention of the organised legal profession and civil society organisations to the work of the community-based paralegal sector in Africa.

The workshop was thus an important platform to elevate the profile of the ACE-AJ and give it the opportunity to interact with the African Commission and civil society organisations working on access to justice in Africa.

About 30 participants attended the event, including a member of the African Commission. Apart from a presentation by the founding members of the ACE-AJ, there were other presentations that addressed key challenges to access for justice for vulnerable groups in Africa.

For more information, please visit the ACE-AJ's website at www.accesstojustice.africa

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